IN THE COURT OF APPEALS OF TENNESSEE
AT KNOXVILLE
May 12, 2005 Session

PAULINE BOYD v. ROSA E. CRUZE, ET AL.

Appeal from the Circuit Court for Anderson County
No. 92LA0496 James B. Scott, Jr., Judge

No. E2003-02697-COA-R3-CV - FILED JUNE 24, 2005

This litigation focuses on a judgment creditor's efforts to collect her money judgment by garnishment. On October 13, 2003, the trial court entered an "Order for Judgment and Costs" against the garnishee, Jalisco Mexican Restaurant ("Jalisco"), for $100,000. Jalisco appealed. We remanded the case to the trial court "for a determination of the proper record" on appeal. In response to the remand, the trial court determined and held that the statement of the evidence filed by Jalisco was the correct record of the proceedings below; however, the court went further and made a number of findings and decrees, including its holding that "no proof ha[d] been introduced with respect to the amount of wages that were or should have been paid" to the judgment debtor. We hold that the trial court exceeded the parameters of the remand when it made additional findings and decrees beyond its designation of the proper record on appeal. The trial court, in so doing, exceeded its jurisdiction as defined in and by the order of remand. We further hold (1) that the response filed by Jalisco is sufficient to constitute an answer and rebut the statutory presumption that Jalisco is "indebted to the [judgment debtor] to the full amount of the [judgment creditor's] demand"; and (2) that Tenn. Code Ann. § 26-2-209 (2000) is not implicated by the facts of this case. Accordingly, we reverse and hold for naught (1) the trial court's findings of November 12, 2004; and (2) the decrees in its order of January 13, 2005, except to the extent of the court's decree that "[t]he Statement of the Proceedings submitted by [the judgment debtor] is adopted by the [c]ourt." We reverse the trial court's order of October 13, 2003, and dismiss the garnishment served on Jalisco, having concluded that the evidence fails to show that a judgment in any amount against Jalisco is warranted.

Tenn. R. App. P. 3 Appeal as of Right; Judgment of the Circuit Court Reversed; Garnishment Dismissed

CHARLES D. SUSANO, JR., J., delivered the opinion of the court, in which D. MICHAEL SWINEY and SHARON G. LEE, JJ., joined.

Robert W. Wilkinson, Oak Ridge, Tennessee, for the appellant, Jalisco Mexican Restaurant.

Harry L. Lillard, Oak Ridge, Tennessee, for the appellee, Pauline Boyd.

OPINION

I. *Procedural History*

A.

On August 12, 1994, Pauline Boyd ("the judgment creditor") was awarded a judgment against Rosa E. Cruze ("the judgment debtor") in the amount of $125,000; the judgment memorialized a jury verdict rendered July 13, 1994. A single payment of $25,000 has been made on the judgment. Some nine years later, on June 6, 2003, a garnishment was issued by the trial court at the behest of the judgment creditor. On June 9, 2003, it was served on Jalisco.

Jalisco did not respond to the garnishment. Thereafter, on August 14, 2003, the judgment creditor filed a motion for a conditional judgment against Jalisco. The certificate of service affixed to the motion recites that a copy of the motion was mailed to Jalisco and the judgment debtor on August 13, 2003. In the motion, Jalisco was noticed for a hearing on August 25, 2003. On the noticed date, the trial court conducted a hearing on the judgment creditor's motion. We do not have a transcript or statement of the evidence of that hearing. Apparently, no one from Jalisco was at the hearing.

Thereafter, counsel for the judgment creditor prepared a conditional judgment for the trial court's signature and delivered it to the office of the trial court clerk. The proposed conditional judgment, which provides for an award "for the amount sought,"[1] has affixed to it a stamp of the trial court clerk reflecting that it was "[*r*]*eceived* this 29th day of August, 2003, at 4:00 P.M." (emphasis added). The proposed conditional judgment recites the following decree:

> ORDERED and ADJUDGED that the Plaintiff is awarded a Conditional Judgment for the amount sought and that the Court further ruled that the matter is reset for September 22, 2003, at 9:00 a.m., at which time the case should be called up again and the Plaintiff would be granted a Final Judgment unless the Respondent Restaurant appeared and showed cause why such should not be done.

(Capitalization in original).

The proposed conditional judgment is a part of the record certified to us by the trial court clerk. *Significantly, it is not signed by the trial court.*

---

[1]The conditional judgment does not expressly state whom the judgment is against. From the tenor of the document, and, in view of the reference in the proposed conditional judgment to the motion for conditional judgment, it is clear that it was intended as a conditional judgment against Jalisco.

On September 19, 2003, Ismael Cruze, the purported sole proprietor of Jalisco, filed a pleading styled "Response to Motion for Conditional Judgment." In it, Mr. Cruze states that "[d]uring early September, 2003, a document entitled Conditional Judgment was mailed to Jalisco." This is consistent with the certificate of service on the proposed conditional judgment which reflects service by mail on Jalisco on August 26, 2003.

In his response, Mr. Cruze notes that the proposed conditional judgment refers to a motion for conditional judgment and a hearing that occurred on August 25, 2003. Mr. Cruze further states in his response that he did not receive a copy of the judgment creditor's motion and "therefore was not aware that the motion would be presented for a hearing on August 25, 2003." The response further states that

> Ismael Cruze owns and operates Jalisco Mexican Restaurant. Rosa E. Cruze is not an employee of Ismael Cruze nor is she an employee of the restaurant owned and operated by Ismael Cruze. Rosa E. Cruze receives no income from the business nor does she have an ownership interest in the business. Therefore, there are no wages to be garnished nor are there any non-wage assets subject to execution.

The response requests that the motion for conditional judgment be denied.

It is clear from the record that a hearing was held on September 22, 2003, on the judgment creditor's request for a "final" judgment against Jalisco. This request for a "final" judgment was pursued even though the proposed conditional judgment had not been entered.[2] Following the hearing, the trial court, on October 13, 2003, entered the aforementioned "Order for Judgment and Costs" against Jalisco for the full amount of the judgment debtor's obligation, *i.e.*, $100,000. That order was signed by the trial court. There is nothing about the "Order for Judgment and Costs" to suggest that it is other than a final judgment. This is how the parties treated it, and we see no reason to do otherwise.

On November 4, 2003, Jalisco filed a notice of appeal. On January 7, 2004, Jalisco filed a pleading in the trial court that is styled "Statement of the Proceedings." The pleading is essentially a statement of the evidence. *See* Tenn. R. App. P. 24(c). Jalisco's filing was met by the judgment creditor's filing on January 16, 2004, again in the trial court, of a document styled as an objection to Jalisco's statement in which the judgment creditor recites the procedural history of the case along with her view of the testimony at the September 22, 2003, hearing.

B.

On March 31, 2004, the Court of Appeals entered an order in this appeal, which provides as follows:

---

[2] In fact, it was *never* entered.

> A review of the record indicates that a statement of the proceedings was filed with the trial court on January 7, 2004. "The Plaintiffs' Objection to the Statement of the Proceedings Filed by the Defendant, Pursuant to Rule 24(c) of the Rules of Appellate Procedure" which actually is the plaintiff's statement of the evidence was filed with the trial court on January 16, 2004.
>
> The trial court has not designated which should be considered by us as the statement of the evidence. Therefore, this matter is remanded to the trial court in accordance with Rule 24(e) of the Tennessee Rules of Appellate Procedure *for a determination of the proper record before us*. The briefing schedule is stayed pending the filing of the correct record with the appellate court clerk.

(Emphasis added).

One week later, the judgment creditor filed a motion asking the trial court to enter the proposed conditional judgment *nunc pro tunc*. The trial court conducted a hearing on April 26, 2004, at which time it refused to sign the conditional judgment, due, at least in part, to the court's failure to remember why it had not signed the conditional judgment when it was originally lodged with the trial court clerk:

> I don't recall . . . as to what my reasons [were] for not signing that judgment. I just don't recall. I don't recall that I said that it is going to be a conditional final judgment, I just don't recall, frankly. If it is unsigned, it is unusual for me not to sign a judgment. I have a method where I have a judgment remains on my desk for a period of ten days and someone has not contested that judgment, then I usually sign it and it becomes final. There are occasions whenever someone then comes and asks me to set that judgment aside, and under the rule, either 59 or 60 of our rules of civil procedure, then I usually hear motions on it. There was nothing in this record that would indicate to me, at least thus far, that that activity had taken place until it got in the Court of Appeals. So I really wish I could breathe more life into what you are saying about me on the 25th of August actually pronouncing that this judgment should be entered. I just don't recall. And I'm just kind of reluctant to say that that was my official decision. I just don't recall.
>
> * * *
>
> [I]t would appear to me that maybe in coming here you are asking this Court to take the position that I remember signing a judgment. If this

> case depends on my remembering signing that judgment, I just don't remember.

At a subsequent hearing on May 28, 2004, the trial court cited, as an additional basis for refusing to sign the conditional judgment, its belief that a judgment against Jalisco would be unjust.[3]

The trial court conducted an evidentiary hearing on October 11, 2004. The court received testimony from the judgment creditor, the judgment debtor, Mr. Cruze, and an individual who testified that he was present at the hearing on August 25, 2003. Following the hearing, the trial court, on November 12, 2004, filed an opinion with its findings:

> The Court finds that a valid judgment has been rendered against [the judgment debtor] in the amount of $125,000 in favor of [the judgment creditor]. This judgment was entered August 12, 1994, and has been subject to [the judgment creditor's] garnishment filed June 9, 2003, against [the judgment debtor's] place of employment at [Jalisco]. This restaurant is owned by [the judgment debtor's] husband but the original judgment is only against [the judgment debtor]. The proof is apparent [the judgment debtor] is not only employed at the restaurant but also is substantially engaged in the activities that are necessary for the daily operations of the restaurant.
>
> Therefore, the Court makes the following findings:
>
> The previous conditional judgment on the return of the garnishment (whether signed or unsigned) will be held for naught; and
>
> A new conditional judgment will be entered against [Jalisco] in the amount due and payable to [the judgment debtor], for the interest or income due [the judgment debtor] on June 9, 2003 (date of garnishment); and
>
> The parties will subject [sic] to further proceedings relating to all issues of income, exceptions, or credits due as of the date of June 9, 2003.

(Paragraph numbering in original omitted). The trial court then entered what it styled as its "Final Order" on January 13, 2005, which states, in pertinent part, as follows:

---

[3] Still later, the trial court expressed its concern about the judgment debtor's comprehension of the English language. The court stated its belief that her unfamiliarity with the language could lead to an erroneous conclusion regarding her testimony.

> [T]he Court finds that a valid judgment has been rendered against [the judgment debtor] in the amount of $125,000.00 in favor of [the judgment creditor]. The Judgment was entered August 12, 1994, and was subject to a garnishment filed June 9, 2003, against [Jalisco]. The restaurant is owned by [the judgment debtor's] husband, Ismael Cruz, but the original judgment is only against [the judgment debtor]. The Court finds that [the judgment debtor] is not only employed at the restaurant, but also is substantially engaged in the activities that are necessary for the daily operations of the restaurant. The Court further finds that no proof has been introduced with respect to the amount of wages paid unto [the judgment debtor], either actual or imputed. The Court's findings are further specified in its Opinion dated November 12, 2004, attached hereto and made a part hereof.
>
> IT IS, THEREFORE, ORDERED, ADJUDGED, AND DECREED AS FOLLOWS:
>
> The Statement of the Proceedings submitted by [the judgment debtor] is adopted by the Court . . . .
>
> Although the proof is apparent that [the judgment debtor] is not only employed at [Jalisco], but also substantially engaged in the activities that are necessary for the daily operations of the restaurant, no proof has been introduced with respect to the amount of wages that were or should have been paid unto her.
>
> [The judgment creditor's] request for a conditional judgment against [Jalisco] is denied.

(Capitalization in original) (paragraph numbering in original omitted). The upshot of the last two documents signed and entered by the trial court is threefold: (1) Jalisco's statement of the evidence was approved by the trial court; (2) a conditional judgment against Jalisco was not entered; and (3) there had been a failure of proof "with respect to the amount of wages that were or should have been paid" to the judgment debtor. As can be seen, the trial court's final ruling in this case, as reflected in these two documents, is significantly different from its "Order for Judgment and Costs" of October 13, 2003, wherein the trial court awarded the judgment creditor a judgment against Jalisco for $100,000.

II. *The Remand*

When Jalisco filed its notice of appeal, jurisdiction was vested in the Court of Appeals, to the exclusion of that of the trial court. *See* ***First Am. Trust Co. v. Franklin-Murray Dev. Co. L.P.***., 59 S.W.3d 135, 141 (Tenn. Ct. App. 2001) (when one "perfects an appeal from a trial court's final

judgment, the trial court effectively loses its authority to act. . . ."). Even though jurisdiction in a given case has vested in the Court of Appeals, we can, while generally retaining jurisdiction over the case, remand the case to the trial court for a specific and limited purpose. *See generally* ***Cook v. McCullough***, 735 S.W.2d 464 (Tenn. Ct. App. 1987).

Tenn. Code Ann. § 27-3-128 (2000) provides as follows:

> The court shall also, in all cases, where, in its opinion, complete justice cannot be had by reason of *some defect in the record*, want of proper parties, or oversight without culpable negligence, remand the cause to the court below for further proceedings, *with proper directions to effectuate the objects of the order*, and upon such terms as may be deemed right.

(Emphasis added). With respect to the necessity of a trial court staying within the parameters of a limited remand, the Supreme Court has stated that

> [i]t is a controlling principle that inferior courts must abide the orders, decrees and precedents of higher courts. The slightest deviation from this rigid rule would disrupt and destroy the sanctity of the judicial process. There would be no finality or stability in the law and the court system would be chaotic in its operation and unstable and inconsistent in its decisions.

State v. Irick, 906 S.W.2d 440, 443 (Tenn. 1995) (quoting ***Barger v. Brock***, 535 S.W.2d 337, 341 (Tenn. 1976)). *See also* ***Cook***, 735 S.W.2d at 470 ("Neither the Trial Judge nor this Court has authority to expand the limitation placed by the Supreme Court upon a remand.").

In ***Weston v. State***, 60 S.W.3d 57, 59 (Tenn. 2001), the Supreme Court held that the trial court had exceeded its authority when, on remand, it allowed the defendant to amend a post-conviction petition. The order of the Court remanding the case to the trial court limited the issue on remand to a determination of "whether petitioner was denied a first-tier appeal of his original post-conviction petition as a result of inaction on the part of appointed counsel." ***Id.*** at 59. Citing the law as set forth in ***Irick*** and ***Cook***, the Court held that the trial court was without authority to permit the defendant to amend his petition. ***Id.***

In the instant case, we remanded this case to the trial court for a very limited purpose. When the record was filed with us, we observed that Jalisco had filed a statement of the evidence in the trial court and that the judgment creditor had seasonably filed exceptions to that statement, including a competing statement of the evidence. The dispute clearly made out by these two pleadings had not been resolved before the record was filed in the Court of Appeals. Under the provisions of Tenn. R. App. P. 24(e), it was the trial court's responsibility to do so. This observation should not be construed as a criticism of the trial court. We suspect, but do not know for sure, that the parties

failed to call this dispute to the trial court's attention. It is not the responsibility of the trial court to periodically review its many pending case files to see if there are any disputes that the parties have failed to call to the court's attention.

We remanded this case to the trial court "for a determination of the proper record before us." This was a very limited remand. Our remand vested the trial court with jurisdiction, but only for the limited purpose of making the determination requested by us. This the trial court did, but it went further and made findings in its filing of November 12, 2004, and pronounced decrees in its "Final Order" of January 13, 2005, which findings and decrees far exceeded the parameters of our limited remand. The trial court did not have jurisdiction to make these findings and decrees. As a consequence of this, the findings and decrees are a nullity and we will not notice them further. *See* ***Sherrell v. Goodrum***, 22 Tenn. 419, 427 (Tenn. 1842) ("If a court acts without authority, its judgments and orders are regarded as nullities. They are not voidable, but simply void, ...")

III. *Facts*

Since the trial court approved Jalisco's statement of the evidence, and since this is the evidence that was presented at the hearing on September 22, 2003, which, in turn, led to the entry of the "Order for Judgment and Costs" on October 13, 2003, we will recite the pertinent portions of Jalisco's statement:

> In the hearing before Judge James B. Scott of the Seventh Judicial District for the State of Tennessee, the only two (2) witnesses that were called to testify were Ismael Cruze and Rosa Cruze. Both witnesses testified that Rosa E. Cruze is not an employee of Jalisco Mexican Restaurant. Both testified that she receives no wages and that she has no ownership interest in the restaurant. However, on examination by Harry Lillard, Ismael Cruze admitted that Rosa E. Cruze had filed an application with the Oak Ridge Beer Permit Board and that she signed the application as manager of Jalisco Mexican Restaurant. Both witnesses testified that Rosa E. Cruze works in the restaurant every Tuesday. According to Ms. Cruze, she works on Tuesdays which is a day off for the manager of the restaurant. She is not compensated for her services.
>
> Ismael Cruze acknowledged that he received the execution that was filed in this cause of action and that he had provided the execution to Mike Ritter, a member of the Anderson County Bar. He did not know whether Mike Ritter had taken any steps to respond to the execution. Ismael Cruze testified that he did not remember ever seeing the Motion for Conditional Judgment which was filed in this cause and included a Notice of Hearing for August 25, 2003. Ismael Cruze acknowledged that he received the Conditional Judgment

> scheduling a hearing for September 22, 2003. He further testified that he contacted Mike Ritter upon receipt of the Conditional Judgment and when it was clear that Mike Ritter could not handle the matter, he contacted Robert W. Wilkinson. When she was shown a copy of the Motion for Conditional Judgment, Rosa E. Cruze acknowledged that she could not read the document. (Rosa E. Cruze has a limited command of the English language and it was difficult for her to understand many of the questions that were asked.)
>
> At the conclusion of the evidence and argument of counsel, Judge Scott determined that in order to do justice to all parties concerned, he had to conclude that Jalisco Mexican Restaurant is a family owned restaurant and that both Ismael Cruze and Rosa Cruze are effectively owners of the restaurant and, therefore, employers of the employees who work at the restaurant. Judge Scott acknowledged that technically Rosa E. Cruze may not be an employee, but because of the relationship that she has to the restaurant, he felt that a conditional judgment should be granted in behalf of the Plaintiff against Jalisco Mexican Restaurant and, therefore, granted the Plaintiff's motion.

We would emphasize again that the findings and decrees of the trial court that occurred after the remand – except for the approval of Jalisco's statement of the evidence – were rendered by the trial court without jurisdiction and are nullities. While those findings and decrees contain several interesting and relevant determinations, we are precluded from considering them.

IV. *Issues*

The thrust of Jalisco's issues on appeal are (1) that the judgment debtor was not an employee of the restaurant; (2) that she was not due any wages when the garnishment was served on Jalisco; (3) that Jalisco was not holding any property belonging to the judgment debtor at the time of the garnishment; and (4) that the judgment creditor is not entitled to a judgment against it for $100,000 or any lesser amount. Jalisco argues that the evidence preponderates against the trial court's judgment.

The judgment creditor makes a number of arguments. We have already expressed our agreement with her argument that the trial court did not have jurisdiction to change its October 13, 2003, order in view of the limited nature of our remand. Hence, as previously noted, we agree with the judgment creditor that the order that is subject to review on this appeal is the last order before the appeal was filed, *i.e.*, the order of October 13, 2003.

The main arguments made by the judgment creditor are (1) that she meticulously followed the garnishment procedure; (2) that Jalisco failed to timely respond to the garnishment; (3) that it failed to timely respond to the motion for a conditional judgment; and (4) that the conditional

judgment should be treated as if it had been signed by the trial court. Her "bottom line" is that *the failure of Jalisco to respond in a timely manner* entitles her to a judgment against Jalisco for the full amount of the unpaid portion of her tort judgment, *i.e.*, $100,000.

V. *Standard of Review*

Our review of this non-jury case is *de novo* upon the record of the proceedings below with a presumption of correctness as to the trial court's factual findings, "unless the preponderance of the evidence is otherwise." Tenn. R. App. P. 13(d). The trial court's conclusions of law are not accorded the same deference. ***Brumit v. Brumit***, 948 S.W.2d 739, 740 (Tenn. Ct. App. 1997). "Issues of statutory interpretation and the application of a statute to particular facts involve questions of law, subject to *de novo* review." ***Smith v. Smith***, W2002-02534-COA-R3-CV, 2004 WL 229089, at *6 (Tenn. Ct. App. W.S., filed February 5, 2004) (citations omitted).

VI. *Discussion*

A.

The judgment creditor chose to pursue collection of the unpaid portion of her judgment against Rosa E. Cruz by serving a garnishment on the judgment debtor's assumed employer, Jalisco. We have defined a "garnishment" as follows:

> Garnishment is a proceeding whereby the plaintiff seeks to subject to his claim property of the defendant in the hands of a third person or money owed by such third person to defendant. The person in whose hands such effects are attached is the garnishee, because he is garnisheed, or warned, not to deliver them to the defendant, but to answer the plaintiff's suit. Upon its service the property, effects, or debts in the hands of the garnishee are in the custody of the law, and beyond the control of either the garnishee or the judgment debtor.

Stonecipher v. Knoxville Sav. & Loan Assoc., 298 S.W.2d 785, 787 (Tenn. Ct. App. 1956) (quoting 38 C.J.S. Garnishment, § 1, p. 199). The failure of a garnishee to respond to a garnishment is addressed in Tenn. Code Ann. § 26-2-209:

> The date garnishee's answer is received by the court clerk shall be noted on the docket book in the proper manner, whether or not the answer discloses any property subject to garnishment. If the garnishee fails to appear or answer, a conditional judgment may be entered against the garnishee for the plaintiff's debt, upon which a notice shall issue to the garnishee returnable at such time as the court may require, to show cause why judgment final should not be rendered against the garnishee. On failure of the garnishee to appear

> and show cause, the conditional judgment shall be made final, and execution awarded for the plaintiff's entire debt and costs.

If a garnishee fails to answer the garnishment, the next step in the process is the entry of a conditional judgment "for the plaintiff's debt." ***Id***. The statute provides that, when the conditional judgment is entered, "a notice shall issue to the garnishee . . . to show cause why judgment final should not be rendered against the garnishee." ***Id***. A "conditional judgment" is also addressed in Tenn. Code Ann. § 29-7-114 (2000):

> If, when duly summoned, the garnishee fail [sic] to appear and answer the garnishment, the garnishee shall be presumed to be indebted to the defendant to the full amount of the plaintiff's demand, and a conditional judgment shall be entered up against the garnishee accordingly.

In the ***Smith*** case, we discussed the untimely filing of a response by a garnishee. There, the garnishee failed to file a response to a garnishment involving one of its employees. 2004 WL 229089 at *2. The judgment creditor filed a motion for a conditional judgment against the garnishee. ***Id***. On the day before the motion was to be heard, the garnishee filed the affidavit of its representative setting forth that money was being taken out of the employee's bi-weekly paycheck and remitted to the Tennessee Child Support Receipting Unit.[4] ***Id***. The response was later updated to reflect that "had [the employer] properly responded to the garnishment, $2,797.66 would have been withheld from [the judgment debtor's] net earnings and remitted to the court clerk." ***Id***., at *3.

Despite the garnishee's response, the trial court granted the judgment creditor's motion and awarded a conditional judgment against the garnishee/employer "for the entire amount of [the judgment debtor's] debt to [the judgment creditor] and the Guardian, which totaled $82,817.40." ***Id***. Following an evidentiary hearing, the trial court entered a final judgment for the same amount. ***Id***., at *5.

On appeal, we reversed, "concluding that, because the garnishee filed an answer, albeit untimely, the trial court was without authority to enter a conditional judgment against the garnishee." ***Id***., at *1. In the course of our opinion, we said the following:

> The parties do not cite, nor have we found, a case determining whether a conditional judgment is an available remedy when the garnishee has filed an answer, albeit untimely or otherwise defective. Cases discussing the function and purpose of a conditional judgment indicate that such a remedy is appropriate *only* if the garnishee fails to file an answer. Moreover, the plain language of the statutes authorizes the imposition of a conditional judgment *if* the garnishee

[4] The garnishment was based on several judgments for child support and fees.

> fails to answer the garnishment. There is no language in the statutes indicating that if the answer is not timely or sufficient, a conditional judgment may be entered. The conditional judgment remedy is clearly intended to be a "wake-up call" to the garnishee, warning the garnishee that it must present a defense to the statutorily imposed presumption that it is indebted to the plaintiff "to the full amount of the plaintiff's demand." If the garnishee files an answer before the conditional judgment is imposed, this obviates the need for such a "wake-up call."

Id., at *8 (citations and footnote omitted) (emphasis in original).

B.

The basic foundation of the judgment creditor's attempt to sustain her $100,000 judgment against Jalisco is the proposed conditional judgment lodged with the trial court clerk on August 29, 2003. She contends (1) that her counsel prepared the conditional judgment pursuant to the trial court's direction following a hearing on August 25, 2003; (2) that counsel left it with the clerk as required by the local rules of court; (3) that the proposed conditional judgment contains a notice of a future hearing for Jalisco to show cause why a final judgment should not be entered against it; (4) that her counsel served a copy of the proposed conditional judgment on Jalisco; (5) that a hearing was held pursuant to the show cause notice; and (6) that, following the hearing, in which Jalisco fully participated, an order awarding her a judgment against Jalisco for $100,000 was signed by the trial court and entered on October 13, 2003. She urges us, in so many words, to *treat* the conditional judgment as filed because, in her view, it should have been filed due to the fact that Jalisco did not timely respond to the motion for a conditional judgment, or because, according to the judgment creditor, Jalisco, by participating in the hearing that led to the order of October 13, 2003, is estopped to deny the entry of the conditional judgment.

The problem with the judgment creditor's argument is that *the conditional judgment, in fact, was never entered*. We recognize that the trial court conducted a hearing on the judgment creditor's motion for a conditional judgment; that the judgment creditor participated in that hearing; and that the trial court apparently directed counsel for the judgment creditor to prepare an order. None of this changes the fact that, for whatever reason, the conditional judgment was never signed and entered by the trial court. As the Supreme Court has observed, "a [c]ourt speaks only through its written judgments, duly entered upon its minutes.'" ***Green v. Moore***, 101 S.W.3d 415, 420 (Tenn. 2003) (quoting ***Evans v. Perkey***, 647 S.W.2d 636, 641 (Tenn. Ct. App. 1982)). Furthermore, we find nothing about Jalisco's participation in the September 22, 2003, hearing – the one that led to the order of October 13, 2003 – that estops it from relying upon the ineffectiveness of the unsigned conditional judgment. In participating in the hearing, Jalisco was simply attempting to defend itself against the imposition of a $100,000 judgment at a duly-scheduled hearing before the trial court. Such participation does not constitute, either expressly or by implication, a concession by it that the unsigned and unentered conditional judgment was, in some way, effective.

With respect to the failure of the trial court to sign and enter the proposed conditional judgment, we note that

> [i]t is the primary duty of counsel to obtain the signature of the judge upon a proposed order or judgment before filing with the clerk. If an unsigned order is received by the clerk for presentation to the judge, this is a mere unofficial courtesy; and it has no official significance until the signed order reaches the hands of the clerk for filing.

Zeitlin v. Zeitlin, 544 S.W.2d 103, 107 (Tenn. Ct. App. 1976).

The judgment creditor relies upon the case of ***NCNB Nat'l Bank of North Carolina v. Thrailkill***, 856 S.W.2d 150 (Tenn. Ct. App. 1993), to support her argument that the failure of Jalisco to file a "timely" response to the motion for conditional judgment barred its attempt to undo the order of October 13, 2003. ***NCNB*** is inapposite. In that case, the garnishee did not answer the garnishment, it allowed a conditional judgment to be entered, it did not appear at the noticed show cause hearing, and a final judgment was entered, from which no appeal was filed. ***Id***., at *152. *Over a year after the final judgment was entered*, the garnishee sought to set aside the final judgment pursuant to Tenn. R. Civ. P. 60.02(1) and 60.02(5). ***Id***. In ***NCNB***, the court simply held that the garnishee was not entitled to relief under Rule 60 because it failed to sustain its argument that its failure to respond to the garnishment proceeding was due to "excusable neglect." ***Id***., at *154. The instant case is not like ***NCNB***. Here, the garnishee did file a response and did so at a time when no judgment of any kind had been entered against it in the garnishment proceeding. The facts in the instant case are different from those in ***NCNB***. Furthermore, the *rationale* underpinning ***NCNB***, *i.e.*, that the moving party there failed to prove a basis for its request for Rule 60 relief, has absolutely no application to the case at bar. Simply stated, ***NCNB*** is of no precedential value with respect to the facts of this case.

It is clear to us that, while Jalisco did not file a timely response to the garnishment, it did file its response at a time when it could still be considered by the trial court.

C.

We have addressed, in some detail, the judgment creditor's argument with respect to the unsigned conditional judgment because of the great emphasis that she places on that document and the hearing that led up to her counsel's lodging of it with the trial court clerk. However, even assuming either that the conditional judgment was in some way effective on or about the date it was lodged with the trial court clerk, or that the judgment creditor was entitled to a *nunc pro tunc* entry of same – positions with which we do not agree – we conclude, as did the court in ***Smith***, that a garnishee's response, even if untimely, is sufficient to constitute an answer and *rebut the Tenn. Code Ann. § 29-7-114 presumption that the garnishee is obligated for the entire amount of the judgment debtor's obligation.* ***Smith***, 2004 WL 229089, at *9. Since a response was filed in the instant case, the relief described in Tenn. Code Ann. § 26-2-209, being premised on a "fail[ure] to appear or

answer," is not available. Such relief simply does not apply to a factual scenario such as the one presented in this case.

If, after a response is filed, the trial court determines that "the garnishee is indebted to the [judgment debtor], or has property and effects of the [judgment debtor] subject to the attachment, the court may, in case recovery is had by the plaintiff against the defendant, give judgment against the garnishee *for the amount of the recovery or of the indebtedness and property*."[5] Tenn. Code Ann. § 29-7-112 (2000) (emphasis added). The latter statute is the appropriate vehicle for a recovery once a response is filed; Tenn. Code Ann. § 26-2-209 is no longer "in play."

In the instant case, there is *no* evidence in the statement of the evidence that Jalisco was indebted to the judgment debtor *in any amount*, nor is there any evidence that Jalisco "has property and effects of [the judgment debtor]." Thus, the evidence preponderates against the entry of a judgment against Jalisco for any amount. The trial court should have dismissed the garnishment. Accordingly, we hereby dismiss it.

VII. *Conclusion*

The judgment of the trial court is reversed and the garnishment is dismissed, with costs on appeal and at the trial court level assessed against the appellee, Pauline Boyd. This case is remanded for collection of the trial court's costs.

_____
CHARLES D. SUSANO, JR., JUDGE

[5] As we understand this statute, a judgment creditor is entitled to recover the lesser of (1) the debt of the judgment debtor to the judgment creditor, and (2) the amount of "the indebtedness and property."